IN THE

Supreme Court of the United States

No.....

OCTOBER TERM, A. D. 1946

SAUL S. FREEMAN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT

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To the Honorable the Supreme Court of the United States:
Your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner was indicted (R. 17) and convicted (R. 34) of conspiring to wilfully violate the Second War Powers Act of 1942 (50 U.S.C.A. App. sec. 633 (5)) and sec. 20.1 of Revised Ration Order No. 16 (9 F.R. 6765).

Petitioner was likewise informed against (R. 2) and convicted (R. 24) for wilfully violating the Second War Powers Act of 1942 and sec. 20.1 of Revised Ration Order No. 16 and for wilfully violating the Emergency Price Control Act (50 U.S.C.A. App. sec. 925 (b)).

The information contains sixteen counts, but only Counts 1, 6, 7, 8, 9, 11, 12, 14, 15 and 16 apply to petitioner and are the counts upon which he was convicted and sentenced. All but Counts 14, 15 and 16 are based upon the Second War Powers Act. Counts 14, 15 and 16 are based upon the Emergency Price Control Act.

The indictment and information were consolidated for trial (R. 23) and the appeals to the circuit court from the convictions (R. 31, 38) were consolidated (R. 58, 556).

After petitioner's conviction by jury in the consolidated trial he was sentenced to ten months imprisonment on Count 1 of the information; to ten months imprisonment and fined $1,000 on Count 11, the imprisonment to run concurrently with that imposed on Count 1; to pay a fine of $1,000 on Count 12; imposition of sentence suspended on Counts 6, 7, 8, 9, 14, 15 and 16 and placed on probation for six months following the expiration of the prison sentences (R. 27-29). On the indictment petitioner was sentenced to imprisonment for ten months to run concurrently with the imprisonment sentences on Counts 1 and 11 of the information (R. 36-37).

After conviction petitioner appealed to the circuit court from both convictions (R. 31, 38) under appropriate assignments of error (R. 41-56, 549) which challenge the sufficiency of the indictment and information to charge an offense, rulings of the court on various evidentiary matters and instructions given by the court.

The Circuit Court of Appeals for the Ninth Circuit affirmed the judgments of conviction (R. 555-567) on December 30, 1945. A petition for rehearing timely filed was denied January 30, 1947 (R. 568).

The case involves the correctness of the opinion and orders of the Circuit Court of Appeals for the Ninth Circuit in effect denying all of petitioner's assignments of errors and affirming the judgments of conviction and this writ of certiorari is sought to review the rulings of the circuit court.

JURISDICTION

The jurisdiction of this court is invoked by virtue of section 240 of the Judicial Code (Title 28 U.S.C.A. sec. 347) and Rule 37(b) of the Federal Rules of Criminal Procedure.

The opinion and orders of affirmance of the circuit court were filed December 30, 1946 (R. 556, 566, 567). A petition for rehearing was denied January 30, 1947 (R. 568).

QUESTIONS PRESENTED

1. Do each of the counts of the information applicable to petitioner charge an offense against the laws of the United States?

2. Does the indictment charge an offense against the laws of the United States?

3. Did the trial court commit prejudicial error in giving the following instruction:

> "'Proof beyond all reasonable doubt' means just what the words imply, that any doubt which will justify acquittal must be a reasonable doubt, must be a doubt based on reason." (R. 478.)

and did the circuit court err in giving approval (R. 564, 565) to such instruction?

4. Did the trial court err in failing to define the term "wilful" in its instructions to the jury and did the circuit court err in holding that such failure did not prejudice petitioner (R. 564)?

5. Did the trial court fail to sufficiently define to the jury all the legal and factual elements the jury was required to know with reference to the indictment and the applicable counts of the information before petitioner could be found guilty?

6. Was there sufficient evidence concerning Counts 14,

15 and 16 of the information to warrant their submission to the jury and a verdict of guilty thereon?

7. Did the trial court err in failing to instruct the jury that the government must prove that at least one of the overt acts charged in the indictment as having been committed in the Eastern District of Washington was committed as alleged?

8. Did the trial court err in instructing the jury as follows:

> "In the event you are convinced or believe that Mr. Michael was an accomplice in that he knew that the law was being violated, you have the right, of course, then, to consider whether it is reasonably likely that he would have known such without the other persons connected with the restaurant having at least as much knowledge" (R. 501).

9. Did the trial court err in allowing, and in failing to instruct the jury to disregard, the opening argument of the United States Attorney to the jury, after both sides had rested, to the effect that because co-defendant Jacobs had pleaded guilty to the conspiracy that such a plea of guilty tended to show a conspiracy between Jacobs and petitioner (R. 523)?

10. Did the trial court err in admitting plaintiff's exhibit 62 (R. 294-303)?

11. Did the trial court err in admitting the evidence of

Louis E. Michael (R. 470) assertedly impeaching petitioner's testimony (R. 436-437)?

12. Were the errors committed by the trial court, considered as a whole, so prejudicial to the rights of petitioner as to deprive him of a fair and impartial trial?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The conviction on the indictment is void because it does not charge an offense against the laws of the United States.

2. The conviction on each of the counts of the information is void because none of such counts charge an offense against the laws of the United States.

3. The instruction of the court concerning the challenged instruction on proof beyond a reasonable doubt placed the burden of proof on petitioner to convince the jury that there was a doubt based upon reason before petitioner could be acquitted. Such an instruction is clearly in conflict with the rule announced in *Lilienthal's Tobacco v. U. S.*, 97 U. S. 237, 266, and *Potter v. U. S.*, 155 U. S. 438, to the effect that the burden of proof never shifts in a criminal case, but at all times rests upon the government to satisfy the jury from the evidence, beyond a reasonable doubt of the *affirmative of the issue* presented in the charge

that the defendant is guilty in the manner and form as charged.

The circuit court's opinion constitutes approval of the future use of this instruction by the district courts (R. 565). Such use we believe will seriously prejudice the rights of future defendants in the Ninth Circuit.

4. The failure of the trial court to define the term "wilful," although a definition was requested by the government (R. 24), and the approval of the circuit court, is directly in conflict with *Screws v. U. S.*, 325 U. S. 91, 101-107. It also conflicts with the doctrine that a conviction should not rest on an equivocal direction to the jury on a basic issue. *Bollenbach v. U. S.*, 326 U. S. 607, 613.

5. The failure of the trial court to properly define all the elements of the offenses of which petitioner was being tried invaded the province of the jury since they were given no opportunity of applying the facts to the law and hence the ruling of the circuit court conflicts directly with *Screws v. U. S.*, 325 U. S. 91, 107; *Bird v. U. S.*, 180 U. S. 356, 361; and *Sparf v. U. S.*, 156 U. S. 51.

6. There was not a scintilla of evidence offered by the government in support of Counts 14, 15 and 16 of the information.

7. The indictment charges overt acts both in the Eastern District of Washington (R. 19-20) where the cause was

tried and also overt acts in Montana (R. 21). The failure of the trial court to differentiate between the two locales of the overt acts permitted the jury to bring in a verdict predicated solely upon only one of the Montana overt acts. Such a result is in conflict with *Nash v. U. S.*, 229 U. S. 373, 379, 380.

8. The trial court's instruction (R. 501) to the effect that Michael's knowledge that the law was being violated could be imputed by the jury to petitioner is in direct conflict with the basic rule that knowledge of another in a criminal case cannot be imputed to a defendant without some evidentiary basis therefor.

9. The United States Attorney's opening argument to the jury at the conclusion of the case that because Jacobs, a co-defendant, had pleaded guilty after having the advice of competent counsel, tended to show a conspiracy between Jacobs and petitioner, was so highly improper and prejudicial as to call for action on the part of the trial court instructing the jury to disregard the remark, which was not done and resulted in serious prejudice to petitioner. The failure of the trial court so to do, and the ruling of the circuit court, conflicts with the duty imposed on the court by *Berger v. U. S.*, 295 U. S. 78; *Viereck v. U. S.*, 318 U. S. 236; and *N. Y. Central Ry. Co. v. Johnson*, 279 U. S. 310.

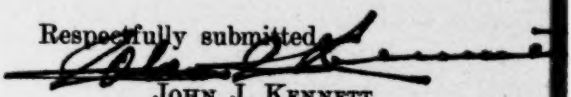
10. Plaintiff's Exhibit 62 was erroneously admitted and was extremely prejudicial to petitioner.

11. The testimony of Louis E. Michael offered to impeach petitioner was erroneously admitted and being the last testimony introduced was extremely prejudicial to petitioner.

12. The errors committed by the trial court and challenged in the appeal to the circuit court were so prejudicial to petitioner as to deprive him of a fair and impartial trial.

WHEREFORE petitioner prays that this Honorable Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Ninth Circuit to the end that such court's opinion and orders affirming the judgments of conviction entered against petitioner may be reviewed and determined by this court, and that the cause be reversed, and for such other relief as the court may deem proper.

Respectfully submitted,



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